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NO. 82-1595

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

FRANCES PECORA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Application for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Should a purely local crime, bribery of a sheriff by an arrestee's mother, be tried in federal court because the mother, while out of state visiting a sick friend, called the sheriff, at his request, and discussed some aspects of the bribery scheme?

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TO THE HONORABLE CHIEF JUSTICE OF
THE UNITED STATES AND ASSOCIATE
JUSTICES
OF THE UNITED STATES SUPREME COURT:

Petitioner, Frances Pecora, respectfully prays that a writ of certiorari

issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered on January 21, 1983, which affirmed the judgment and sentence imposed in these proceedings by the United States District Court for the Eastern District of Louisiana, Honorable Fred J. Cassibry, Judge presiding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 693 F.2d. 421 (1982). That opinion is reproduced herein at Appendix A, p. A-1 et seq., infra.

There was no written opinion of the Panel or of the Fifth Circuit en banc accompanying the denial of petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. A Table entry reporting the denial of rehearing is pub-

lished at 697 F.2d 1092, and is reproduced herein at Appendix B, p. B-1, infra.

There was no written opinion of the District Court herein.

GROUNDS ON WHICH SUPERVISORY JURISDICTION OF THIS COURT IS INVOKED

The opinion of the Fifth Circuit Court of Appeals was rendered on December 1, 1982 (Appendix A, p. A-1 et seq., infra) and entered in these proceedings on January 21, 1983 (Appendix B, p. B-1, infra) when the Court denied a timely petition for rehearing and suggestion for rehearing en banc.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1). See also, Rewis v. U.S., 401

U.S. 808, 98 S.Ct. 1056, 28 L.Ed.2d 493 (1971).

STATUTORY PROVISIONS INVOLVED

This case originated in the United States District Court for the Eastern District of Louisiana upon an indictment charging petitioner with conspiracy, wire fraud, and use of an interstate facility to carry out a bribery scheme in violation of 18 U.S.C. §§ 2, 371, 1343, and 1952.

18 U.S.C.§1343, the wire fraud statute, reads:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both.

The Travel Act, 18 U.S.C. § 1952, reads, insofar as is pertinent here:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to --

(1) distribute the proceeds of any unlawful activity; or

. . . .

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity.

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means . . . or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

. . . .

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition

Appellant, Frances Pecora, together with her son, Nofio Pecora, Jr. and Jimmy N. Burrescia, were indicted on December 19, 1980, and charged in a three-count indictment with:

(1) conspiracy to commit wire fraud and conspiracy to use facilities of interstate commerce to conduct racketeering,

(2) wire fraud, and

(3) use of interstate facilities, vis, a telephone, to conduct bribery in violation of La. R.S. 14:118.

Frances Pecora timely objected to the jurisdiction of the District Court in this purely local bribery offense on the basis that the single interstate telephone call was incidental and not for the purpose of executing the scheme.

Trial by jury was had between March 30, and April 6, 1981, returning a guilty

verdict on all counts. The Trial Court sentenced Frances Pecora to serve two concurrent two-year sentences on Counts I and II and , she was given a suspended sentence with three years probation and a fine of $10,000.00 on Count III.

The Court of Appeals affirmed the judgment, with a strong dissent by former Chief Judge, John R. Brown, and subsequently denied an application for rehearing and suggestion for rehearing en banc.

B. Statement of Facts Relevant to this Petition

On October 13, 1980, appellant's son, co-defendant Nofio Pecora, Jr. was arrested by State authorities for possession of approximately 1,000 pounds of marijuana. The mother, appellant Frances Pecora, made arrangements through an

honorary deputy sheriff, Jimmy Burrescia, to pay the sheriff $60,000.00 to take care of the case against her son. While Frances Pecora was out of state visiting a sick friend, the sheriff telephoned her son, requesting that Frances call him. The son telephoned Frances and she returned the sheriff's call, stating:

"I wouldn't have called you but I was told that you said call you." (Tr. 387)

Federal jurisdiction of this purely local matter was based entirely upon this incidental telephone call.

REASONS FOR ALLOWING THIS WRIT

The glut of writ applications to this court is caused partially by the expansion of federal prosecutions into matters that are local in nature. However, through the ingenuity of federal prosecutors, a tenuous federal

involvement is discovered and a matter that should be tried in state court is tried in federal court, thereby unnecessarily increasing the strain upon the federal judiciary. This case is a prime example.

Rather than call for the creation of intermediate federal appellate courts, perhaps this court, in the exercise of its supervisory jurisdiction, should tighten up the requirements of federal criminal jurisdiction by disallowing the prosecutoral expansion of federal criminal jurisdiction into purely local crimes. This is a less dramatic method than the Seventh Circuit uses to limit civil matters. See Microcomputer Software Systems, Inc. v. Ontel Corp., 686 F.2d 531 (7th Cir. 1982).

The wire fraud statute, 18 U.S.C. §1343, requires that the interstate communication be "for the purpose of executing such scheme", while the Travel Act, 18 U.S.C. §1952 requires that the interstate activity be "with intent to . . . facilitate the promotion, management, establishment, or carrying on of any unlawful activity . . .".

Frances Pecora called the Sheriff, not for the purpose of executing the bribery scheme, and not even intending to facilitate the scheme but merely because the Sheriff had asked her son to have his mother call him. The Sheriff testified that the reason he asked Frances to call him was because the "investigation" was getting out of control and he was trying to get it back in control by setting up another meeting with her. (Tr. 679) The

interstate telephone conversation, which was recorded and introduced into evidence, was unnoteworthy except that Frances agreed that she would meet with the Sheriff when she returned from visiting her sick friend. As stated in the dissent by Judge John R. Brown,

> "Because federal jurisdiction should not be based on fortuity, such as the incidental phone call made by Pecora when she heard that the Sheriff wanted to talk to her, I cannot find jurisdiction proper under §1343."

It is a matter of judicial responsibility to limit the prosecutoral reach when only minimal and incidental interstate activity occurred by "happenstance" rather than design. U.S. vs. Bass, 404 U.S. 336 (1971); and Rewis vs. U.S., 404 U.S. 808 (1971).

It was never intended that the federal government should take over or

supersede local law enforcement when our federal republic was formed. The Federalist Papers and other writings preceding ratification of our Constitution are replete with the promise that local matters would be handled locally.

This case offers an opportunity to limit the expansion of federal criminal jurisdiction into purely local matters. A local bribery should not be converted into federal wire fraud and Travel Act violations merely because the perpetrator of the bribery of a local Sheriff happened to go out of state to visit a sick friend and returned a call to the Sheriff.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari

and, after plenary consideration herein, this Court should reverse the judgment below on all counts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James A. McPherson, Attorney of Record for the petitioner in the above styled cause and a Member of the Bar of the Supreme Court of the United States, certify that I have served three copies of the foregoing Petition for a Writ of Certiorari upon the Solicitor General of the United States, first class postage prepaid, this _____ day of March, 1983.

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APPENDIX "A"

UNITED STATES of America,
Plaintiff-Appellee,

v.

Frances PECORA and Nofio Pecoraro,
a/k/a Norfio Pecora, Jr.,
Defendants-Appellants.

No. 81-3312.

United States Court of Appeals,
Fifth Circuit.

Dec. 1, 1982.

Appeals from the United States District Court for Eastern District of Louisiana.

Before BROWN, GEE and GARWOOD, Circuit Judges.

Affirmed.

Brown, Circuit Judge, concurred in part and dissented in part and filed opinion.

GEE, Circuit Judge:

Defendants Frances Pecora and her son, Nofio Pecoraro, were charged by indictment with conspiracy, wire fraud, and use of an interstate facility to carry out a bribery scheme in violation of 18 U.S.C. §§ 2,371, 1343, and 1952.[1] After pleas of not guilty were entered, both defendants moved to dismiss the indictment for lack of jurisdiction.[2]

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1. 18 U.S.C. § 1343, the wire fraud statute, reads: Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign comerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.
The Travel Act, 18 U.S.C. § 1952, reads, insofar as is pertinent here:
(a) Whoever travels in interstate or foreign commerce or uses any facility

The district court deferred ruling on this motion pending presentation of evidence at trial. Following a jury trial, each defendant was found guilty. The defendants again asserted their jurisdictional argument in a motion for judgment of acquittal, which the district court denied. Sentences were assessed, and this appeal followed.

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in interstate or foreign commerce, including the mail, with intent to--
(1) distribute the proceeds of any unlawful activity; or
(2) commit any crime of violence to further any unlawful activity; or
(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity,and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has

Background

Nofio Pecoraro was arrested on October 13, 1980, on state charges of possession with intent to distribute marihuana. The next day, Frances Pecora met Sheriff Layrisson, who held her son in custody. Two weeks later, Jimmie Burrescia [3] met with Layrisson and discussed campaign contributions (regarding a millage campaign) as well as the individuals arrested in the drug "bust," including Pecoraro. On October 29, Burrescia returned to the sheriff's office and gave $9,000 in cash to

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not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

Layrisson and the District Attorney of Tangipahoa Parish. Prior to the conversation, a Special Agent of the Federal Bureau of Investigation had been contacted, and the affair was recorded. The money was given to Burrescia by Frances Pecora for the purpose of insuring that her son would not be convicted. On November 5, 1980, the sheriff, District Attorney, and Burrescia met again to discuss the bribe, and this conversation was likewise recorded. A meeting in which Frances Pecora was included was set up for the next day at Burrescia's home. This meeting, likewise recorded, revealed that Pecora wanted the help of the sheriff and the District Attorney in protecting her son. Several more meetings, all recorded,

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2. Defendant Frances Pecora also separately filed a motion to dismiss on jurisdictional grounds and on the ground that the indictment was multiplicitous.

between Layrisson and Burrescia took place in the following weeks, and the sheriff indicated that he wanted to talk to Pecora. Thus Burrescia attempted to call Frances Pecora from the sheriff's office, and learned that she was in Georgia. He then told the sheriff that he would have Pecora call the sheriff from Georgia.

Later that day, Burrescia called Sheriff Layrisson and then handed the telephone to Nofio Pecoraro to talk to the sheriff. Layrisson asked Pecoraro to have his mother call him. The following morning, Frances Pecora returned the sheriff's call and explained that she was in Georgia to visit a sick friend and that she had been told that he wanted to talk to her. In the conversation that ensued,

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3. A third defendant, who was convicted and did not appeal.

many of the details and terms of the bribery scheme were discussed.

Threshold Issue: Jurisdiction under Sections 1952 and 1343

The initial issue raised by the defendants is whether the federal courts may assume jurisdiction over this local bribery case, involving only Louisiana residents, under 18 U.S.C. §§ 1343 or 1952 on the basis of a single interstate telephone call made at the request of Sheriff Layrisson. The government argues that this call was sufficient to establish jurisdiction under the Travel Act (§ 1952) and also under the wire fraud statute (§ 1343) because the phone call facilitated the bribery and because the call was made for the purpose of executing the bribery scheme. Passing upon this slender jurisdictional basis requires us to

examine closely the recent cases construing these federal laws.

In United States v. Perrin, 580 F.2d 730 (5th Cir.1978), aff'd, 444 U.S. 37, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979), this court, faced with a similar claim that interstate contacts were insufficient to found jurisdiction under the Travel Act, held that one interstate phone call by a defendant to obtain gravity maps necessary to exploit stolen seismic exploration charts was sufficient to invoke § 1952 jurisdiction. We found "no requirement that the use of interstate facilities be essential to the scheme: it is enough that the interstate travel or the use of interstate facilities makes easier or facilitates the unlawful activity." 580 F.2d at 736, citing Rewis v. United States, 418 F.2d 1218, 1221 (5th Cir.1969), rev'd. on other grounds,

401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d. 493 (1971). We see no principled distinction between this case and the present one. There, as here, the defendant argued "that the interstate nexus supplied by their use of interstate facilities was isolated, minimal, inconsequential, and nonessential to the ....scheme and insufficient to establish jurisdiction under the Travel Act." Id. at 735. The court responded by holding that one telephone call sufficed.

And in United States v. Archer, 486 F.2d 670 (2d Cir.1973), the court found that a phone call from Paris to New York, made by an undercover agent, "served no purpose that would not have been equally served by a call from New York," and could thus be characterized as "a casual and incidental occurrence," United States v. Corallo, 413 F.2d. 1306, 1325 (2d Cir.),

cert. denied, 396 U.S. 958, 90 S.Ct. 431, 24 L.Ed.2d 422 (1969), or "a matter of happenstance," Rewis v. United States, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d. 493, 496 (1971). 486 F.2d at 682-83.

The defendants make several arguments on the basis of the above cases. As we have already said, we reject any contention that the phone call from Georgia did not facilitate or benefit the bribery scheme. We likewise reject the defendants' suggestion that the request by the sheriff for Frances Pecora to call him was an attempt artificially to create or manufacture federal jurisdiction under the Travel Act; the district court found as a fact and on ample evidence that the sheriff requested Burrescia to have Frances Pecora call him before the sheriff knew that she was in Georgia. Unlike

Archer, the interstate element in this case was not furnished solely by undercover agents and there is no question of any attempt to contrive jurisdiction.

Finally, we discern in the Travel Act no exception for casual and incidental occurrences or for "happenstance" ones. Its language is straightforward and comprehensive. Therefore, even were we not constrained by our prior holdings in Perrin and Jones, we would conclude that jurisdiction existed here.

As to the convictions under the wire fraud statute, 18 U.S.C. §1343, the defendants repeat their arguments challenging jurisdiction. Here as well, however, the use of interstate wires need not actually further the illegal scheme, but need only be intended to execute the scheme. United States v. Hammond, 598 F.2d 1008, 1010 (5th Cir.), remanded on

rehearing, 605 F.2d 862 (5th Cir.1979). In United States v. Davila, 592 F.2d 1261 (5th Cir.), cert. denied, 444 U.S. 843, 100 S.Ct. 85, 62 L.Ed.2d 56 (1979), we held that an interstate transmission "at the heart" of a scheme cannot be too incidental to invoke § 1343 jurisdiction. And we have likewise held that one phone call is sufficient to constitute an offense, Huff v. United States, 301 F.2d 760, 765 (5th Cir.), cert. denied, 371 U.S. 922, 83 S.Ct. 289, 9 L.Ed.2d 230 (1962). As with the travel act, jurisdiction was present here on the plain language of the wire fraud act.

Refusal to Excuse Juror

During an evening recess, when a juror answered the telephone about 11:00 p.m., a female voice inquired whether she was on the jury. Upon being told that she was, the caller asked in what case. At

this point, the juror replied that she could not talk, hung up and disconnected the telephone. She advised the judge of the incident the next morning, stating in reponse to his questions that she would not be affected by it and that the other jurors regarded the incident, of which she had told them, as a prank. Out of her presence, defense counsel requested that she be excused and replaced by one of the several alternate jurors. Before us, appellant Pecoraro contends that the judge erred in declining to do so. The situation was a delicate one, fraught with potential for error. See, e.g., United States v. Forrest, 620 F.2d 446 (5th Cir.1980). We conclude, however, that Pecoraro has waived any right to complain of the court's refusal to excuse the juror.

At the conclusion of the colloquy with the juror in question, the trial judge voiced his concern that to excuse her at such a time and on such a ground might encourage further attempts by the nighttime caller to disqualify jurors, so that "we may end up with no jury at all." After further discussion between court and counsel, the court adopted--with the apparent acquiescence of all counsel--a compromise course: the juror would be retained on the panel, but counsel's right to re-urge the motion to strike her or the entire panel at any later time was expressly reserved and maintained by the court. No effort to do so was ever made by any counsel thereafter.[4] We conclude that this failure to raise the matter again at trial and, in effect, to gamble on a favorable verdict while reserving the objection for appeal constitutes an

impermissible attempt to sandbag the judicial process.

This we cannot countenance; the point has been waived. Nor, assuming that considerations of plain error are appropriate to this situation of apparent deliberate waiver, are any of these apparent. The trial judge, impliedly at least, accepted the juror's assertions that this simple inquiry as to her status as a juror would not affect her and that the other jurors regarded it as a prank or joke. In this, no such error appears as, by its obviousness or otherwise, was of such magnitude as to call in question the fairness, integrity or public reputation of the proceedings. United States

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4. That defense counsel retained the incident in mind is evidenced by the inquiry of one, near the close of the trial, whether any other juror had reported such an attempted contact, as the court had instructed all to do. None had.

v. Atkinson, 297 U.S. 157, 56 S.Ct. 391, 80 L.Ed. 555 (1936).

Other Claims for Reversal

Appellants advance several other points for reversal: that the wire fraud and travel act counts are multiplicitous, that the court erred in refusing to admit transcripts of certain taped conversations, that certain comments in argument by counsel for the United States were erroneous, and that certain instructions and refusals to instruct by the trial judge--as in declining to instruct on a duress defense--were reversible. We have considered all of these carefully, in the context of the trial, and conclude that none merits discussion.

Conclusion

For the above reasons, the judgments below are

AFFIRMED.

JOHN R. BROWN, Circuit Judge, concurring in part and dissenting in part:

I concur fully in the Court's opinion on "Refusal to Excuse Juror" and "Other Claims for Reversal". This includes as well the Court's determination as to both §§ 1343 and 1952 that the telephone call from Georgia was not contrived as an attempt artificially to create or manufacture federal jurisdiction. Furthermore and not without substantial misgivings, I concur in the affirmance of the conviction for violation of the Travel Act, 18 U.S.C. § 1952.

But as to the conviction for wire fraud violation, 18 U.S.C. § 1343, I must dissent.

To begin with, I agree with the Court that "the use of interstate wires need not actually further the illegal scheme, but

need only be intended to execute the scheme". Op. 1241 and the Court's citation and quotation from United States v. Davila, that the interstate transmission "at the heart of the scheme" must be more than just incidental. But the phone call from Pecora in Georgia was clearly not at the "heart" of this bribery scheme. Even though the details of the phone conversation clearly furthered the bribery scheme, the use of interstate facilities was incidental. The wire fraud statute is analogous to the mail fraud statute, 18 U.S.C. § 1341, Napper v. Anderson, Henley, Shields, Bradford & Pritchard, 500 F.2d 634, 636 (5th Cir.1974), cert. denied, 423 U.S. 837, 96 S.Ct. 65, 46 L.Ed.2d 56 (1975), and there is no § 1341 violation if the use of mails is incidental and unpremeditated, Glenn v. U.S., 303 F.2d 536 (5th Cir.1962).

Because federal jurisdiction should not be based on fortuity, such as the incidental phone call made by Pecora when she heard that the sheriff wanted to talk to her, I cannot find jurisdiction proper under § 1343.

I would therefore reverse with directions to dismiss the wire fraud count.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-3312

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

FRANCES PECORA and
NOFIO PECORARO, a/k/a
NORFIO PECORA, JR.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 1, 1982, 5 Cir., 1983, _____F.2d_____).
(January 21, 1983)

Before BROWN, GEE and GARWOOD, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having

requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

S/Thomas Gibbs Gee
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE.